

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

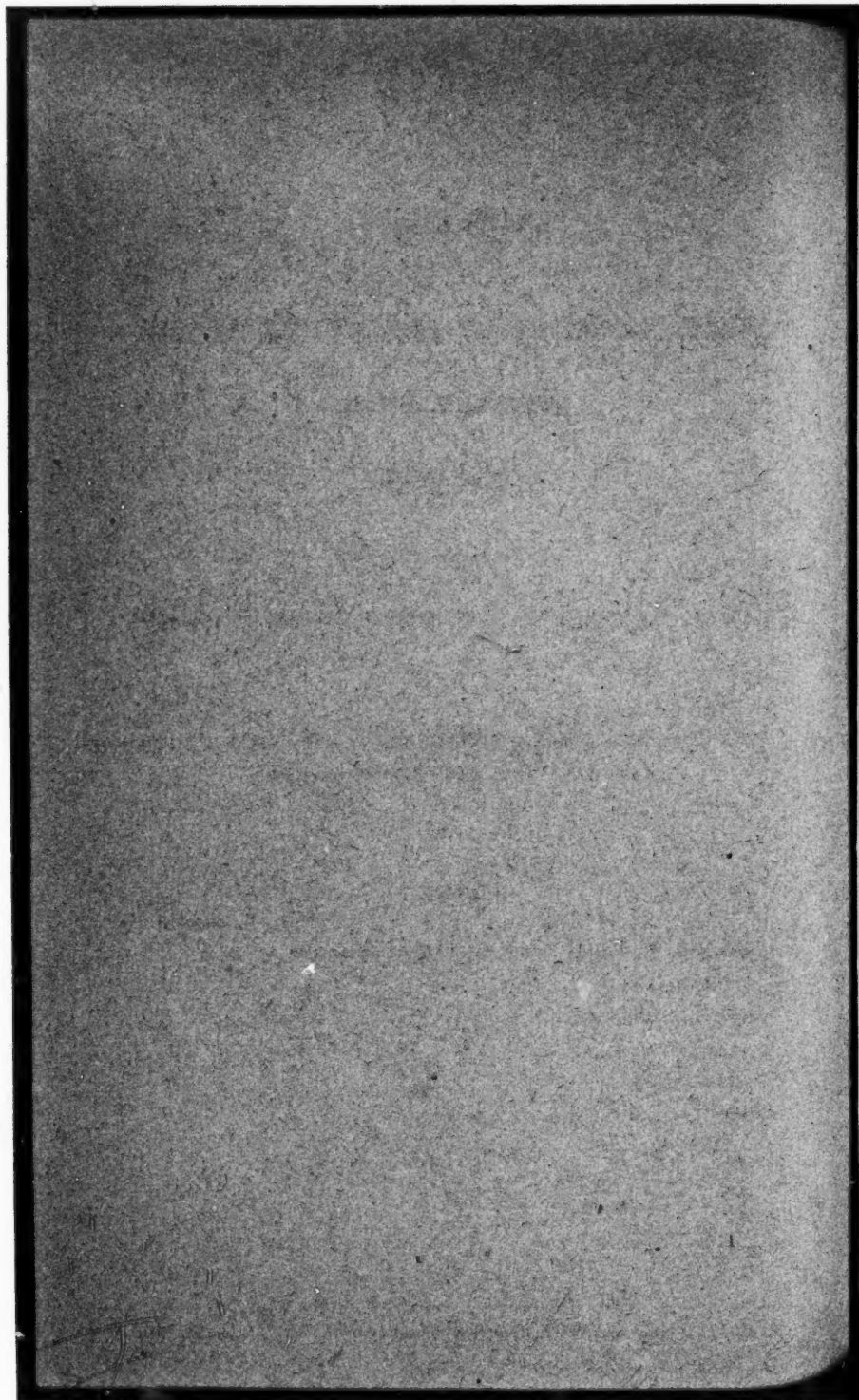
No. 165.

IN THE MATTER OF GEORGE HARRIS, BANKRUPT.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.

FILED MARCH 6, 1909.

(21,538.)



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Original. Print

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1 United States Circuit Court of Appeals, Second Circuit.

Before Lacombe, Ward, and Noyes, Circuit Judges.

In the Matter of GEORGE HARRIS, Bankrupt.

This cause came here upon a petition by the bankrupt to revise an order of the district court, Southern District of New York sitting in bankruptcy. The order directed the bankrupt within five days to deposit his books of account in the office of the Receiver in bankruptcy where the same should remain in the custody and possession of the bankrupt until the further order of the court. It contains the following provisions:

"that the said bankrupt shall afford the said Receiver, and his duly authorized representatives, full and free opportunity at his said office to inspect the said books and make extracts therefrom; that the said Receiver shall use the same, or permit their use by any other person, only and solely for the purpose of civil administration of the estate in bankruptcy, and that the same shall not be used in or for the purpose of any criminal action, proceeding or prosecution against the said alleged bankrupt, in or before any Tribunal, Court or Judge of any state or of the United States; it is further

2 "Ordered, that in case any subpoena or other process is issued to the said Receiver for the purpose of obtaining the possession or production of any of said books, the said Receiver shall forthwith notify the said bankrupt, to the end that said bankrupt may have an opportunity to raise the question of his constitutional privilege."

It is contended by petitioner that this order violates the bankrupt's constitutional privilege under the Fifth Amendment to the Constitution of the United States, reliance being had on *Counselman v. Hitchcock*, 142 U. S. 573. The question is one upon which this court desires the instruction of the Supreme Court for its proper decision.

Statement of Facts.

In February, 1908, the bankrupt made a statement as of January, 1908, to a commercial agency. Upon an examination had under the provisions of Section 21a of the bankrupt act, two papers, purporting to be a statement made by the bankrupt to Bradstreet's Agency showing his assets and liabilities as of January 4th, 1908, and a letter enclosing the same were exhibited to the bankrupt, but he declined to testify concerning them on the ground that they might tend to incriminate him. Shortly after the filing of the involuntary petition herein, several creditors of the bankrupt threatened him with criminal prosecution for having obtained merchandise from them on credit by virtue of a false written statement as to his financial standing and responsibility claimed to have been made by him to Bradstreet's Agency.

The petitioner made oath that his books of account contain evidence which may tend to incriminate him, and filed an affidavit

sworn to by one of his attorneys to the effect that said books will show that the statement purporting to have been made by the bankrupt to the agency is in some material particulars incorrect.

3 The Receiver stated that the particular purpose for which he desired the books was to ascertain what disposition was made of the assets claimed by the bankrupt in his statement to the agency. The bankrupt expressed a willingness to permit an inspection of his books provided that could be done under some arrangement whereby he would not waive his right that the books should not be used against him in any criminal case.

Petitioner duly objected and excepted to the entry of the order now under review on the ground that no statutory provision either in the bankrupt act or elsewhere protects him against the use of such information as may be found in his books to locate and obtain witnesses and evidence which may be produced against him on a criminal prosecution.

Question Certified.

Upon this state of facts is the order of the Bankruptcy Court a proper exercise of its authority?

In accordance with the provisions of Sec. 6 of the Act of March 31, 1891, the foregoing question of law is by the Circuit Court of Appeals for the Second Circuit, hereby certified to the Supreme Court.

New York, February 26, 1909.

E. HENRY LACOMBE,
H. G. WARD,
WALTER C. NOYES,
Circuit Judges.

4 United States Circuit Court of Appeals for the Second Circuit.

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing amended certificate was filed and entered of record in my office on the 26th day of February, 1908, and by direction of the Judges of said Court said certificate is forwarded to the Supreme Court of the United States.

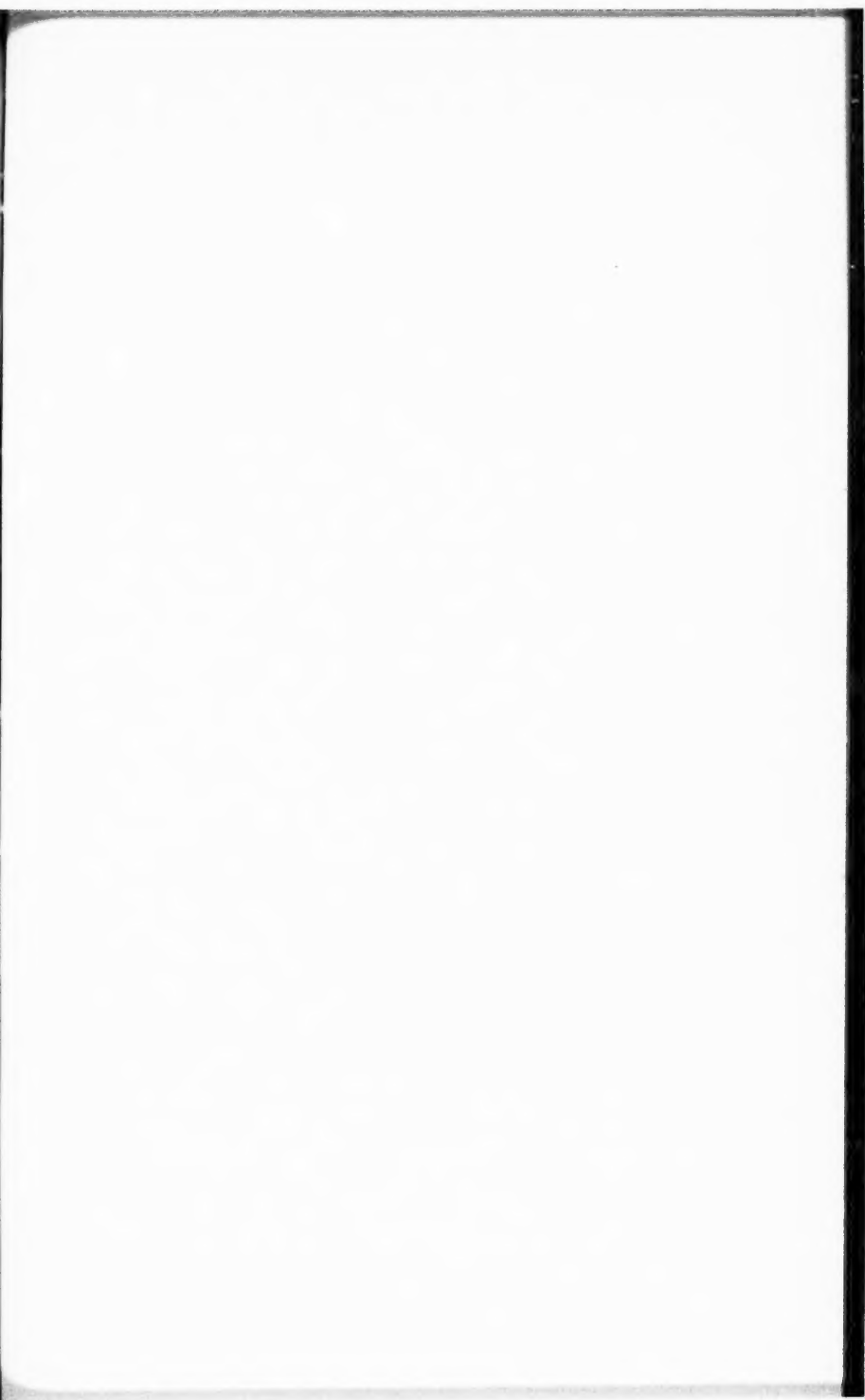
Dated New York February 26th, 1909.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
*Clerk of the United States Circuit Court
of Appeals for the Second Circuit.*

5 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re George Harris, Bankrupt. Amended Certificate. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 26, 1909. William Parkin, Clerk.

Endorsed on cover: File No. 21,538. U. S. Circuit Court of Appeals, 2d Circuit. Term No. 165. In the matter of George Harris, bankrupt. (Certificate.) Filed March 6th, 1909. File No. 21,538.





U.S. DEPT. OF JUSTICE
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CLERK

Supreme Court of the United States,

OCTOBER TERM, 1910—No. 185.

IN THE MATTER

OF

GEORGE HARRIS,

Bankrupt.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF RECEIVER IN BANKRUPTCY.

ABRAM I. ELKUS,
CARLisle J. GLEASON,

Of Counsel.

Supreme Court of the United States.

In the Matter

of

GEORGE HARRIS, Bankrupt.

October Term,
1910.

No. 165.

*Brief for Receiver
in Bankruptcy.*

This case comes up on a certificate from the United States Circuit Court of Appeals for the Second Circuit.

Statement of Facts.

Shortly after the filing of the involuntary petition herein, several creditors of the bankrupt threatened him with criminal prosecution for having obtained merchandise from them on credit by virtue of a false written statement as to his financial standing and responsibility claimed to have been made by him to Bradstreet's Agency.

The petitioner made oath that his books of account contain evidence which may tend to incriminate him, and filed an affidavit sworn to by one of his attorneys to the effect that said books will show that the statement purporting to have been made by the bankrupt to the agency, is in some material particulars incorrect.

The receiver stated that the particular purpose for which he desired the books, was to ascertain what disposition was made of the assets claimed by the bankrupt in his statement to the agency. The

bankrupt expressed a willingness to permit an inspection of his books, provided that could be done under some arrangement whereby he would not waive his right that the books should not be used against him in any criminal case.

Petitioner duly objected and excepted to the entry of the order now under review, on the ground that no statutory provision, either in the Bankrupt Act or elsewhere, protects him against the use of such information as may be found in his books to locate and obtain witnesses and evidence which may be produced against him on a criminal prosecution.

The District Court for the Southern District of New York directed the bankrupt within five days to deposit his books of account in the office of the receiver in bankruptcy where the same should remain in the custody and possession of the bankrupt until the further order of the Court. It contains the following provisions :

“That the said bankrupt shall afford the said receiver and his duly authorized representatives, full and free opportunity at his said office to inspect the said books and make extracts therefrom ; that the said receiver shall use the same, or permit their use by any other person, only and solely for the purpose of civil administration of the estate in bankruptcy, and that the same shall not be used in or for the purpose of any criminal action, proceeding or prosecution against the said alleged bankrupt, in or before any tribunal, Court or Judge of any State or of the United States ; it is further

Ordered, that in case any subpoena or other process is issued to the said receiver for the purpose of obtaining the possession or production of any of said books, the said receiver shall forthwith notify the said bankrupt, to the end that said bankrupt may have an opportunity to raise the question of his constitutional privilege.”

The Circuit Court of Appeals certified the question raised to this Court in the following form :

“ Upon this state of facts is the order of the Bankruptcy Court a proper exercise of its authority ?

In accordance with the provisions of § 6 of the Act of March 31, 1891, the foregoing question of law is by the Circuit Court of Appeals for the Second Court hereby certified to the Supreme Court.”

POINTS.

I.

The bankrupt's contention involves an impairment both of efficiency in the administration of the Bankrupt Act and of the Court's power to take possession of the bankrupt estate.

A right in a bankrupt to refuse on any ground to turn over his books upon the order of the Court to his receiver or trustee entails very serious consequences. The possession of the bankrupt's books is essential to the proper administration of the estate. A receiver or trustee has no method of securing information concerning the estate which will take the place of the books. Information from employees or others in a business involving many transactions must necessarily be fragmentary. If access to the books is denied, acts of the bankrupt which are void or voidable under the Act or the State Law will not become known, as, for example, preferences, concealments and fraudulent transfers. Full and accurate data essential to the conduct of the estate will be unprocurable, for example, lists of assets and accounts receivable and names of the debtors and creditors of the estate.

As District Judge HOLT said in the present case *In re Harris*, 164 *Fed. Rep.*, 292, p. 293 :

“ A rule under which a bankrupt may, in any case, at his own option, refuse to produce his books may, in many instances, almost paralyze the power of the court to administer the estate. No business of any considerable magnitude can be or is carried on without keeping books of account ; and when such a business becomes bankrupt it is practically almost impossible for a receiver or trustee to properly discharge his duties without having possession of the books of the business.”

The more of fraud there has been on the part of the bankrupt the more strongly entrenched he will be against being obliged to turn over his books, and the more impossible will it become for the Court to effect an equitable distribution of his assets among his creditors.

If the Court can not take the property of the estate it is administering into its control it loses to that extent its jurisdiction and power over that estate.

There is the strongest practical objection to the contention of the bankrupt.

II.

The Fifth Amendment of the Constitution does not prevent a court from compelling a bankrupt to yield his books for purposes of civil administration of his estate.

The Fifth Amendment to the Constitution provides that no person “ shall be compelled in any criminal case to be a witness against himself.”

In *Brown vs. Walker* (161 U. S., 591; 40 L. Ed., 819), Mr. Justice BROWN, at p. 596, says that the historical origin and the purpose of the rule which is embodied in this amendment was to protect an accused person from inquisitorial proceedings by the government.

“The maxim *Nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system and until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner and entrap him into fatal contradictions, which is so painfully evident in many of the earlier State trials, notably in those of Sir Nicholas Throckmorton and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But however adopted, it has become firmly imbedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one

accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim which in England was a mere rule of evidence became clothed in this country with the impregnability of a constitutional enactment."

Mr. Justice BROWN next refers to the exceptions of the application of the principle, viz.:

Where the privilege is waived;

Where the accused person takes the stand in his own behalf;

Where the prosecution is barred by the Statute of Limitations;

Where the witness has been pardoned;

Where the answer of the witness will only tend to degrade or disgrace him; and

Where the danger is not real and appreciable but rather imaginary and unsubstantial.

In *Counselman vs. Hitchcock* (142 U. S., 547; 35 L. Ed., 1110), Opinion by Mr. Justice BLATCHFORD, this Court held that within the purview of the 5th Amendment an investigation by a grand jury was a criminal case, and that a witness might not be required to answer questions in such an investigation which might show that he had committed a crime for which he might be prosecuted. This case is the broadest application which this Court has made of the rule.

If any effect whatever is to be given to the words "witness" and "criminal case" in the amendment, it is apparent that the present case is excluded. The bankrupt is not a witness nor is the proceeding a criminal case. The question is whether the bankrupt is entitled to withhold his books from the Court which wishes to use them in the civil administration of the estate because among all the other entries there are entries which the

bankrupt claims would tend to prove him guilty of a crime.

Counselman vs. Hitchcock is readily distinguishable by reason of the difference in the nature of the proceeding, and the different object sought thereby.

The reason which lies behind the rule in the amendment, *i. e.*, the protection against governmental inquisition, has no application in the present case. Here the books are wanted for civil administration and the order of the Court provides that they shall be used only for that purpose, shall not be used in any criminal action, proceeding or prosecution and that in case any process is issued to the receiver for the purpose of obtaining the books or the production of the books the bankrupt shall be notified so that he may raise the question of his constitutional privilege.

The bankrupt has raised the question of privilege prematurely, and his present contention comes within the exception quoted in *Brown vs. Walker*, *i. e.*, "where the danger is not real and appreciable." The bankrupt should wait until some proceeding or investigation is taken which tends to a criminal prosecution before advancing his plea of privilege.

It is not enough, as argued by the bankrupt, that from the books someone might get information which would lead to the discovery of witnesses or facts which could be used against him in a criminal case. It must be assumed here that the order of the Court confining the use of the books to civil administration will be complied with.

The English Law furnishes a limitation of the principle of the amendment which is a potent consideration here.

In *Brown vs. Walker* (p. 600), Mr. Justice BROWN says :

"As the object of the first eight amend-

ments to the Constitution was to incorporate into the fundamental law of the land certain principles of natural justice which had become permanently fixed in the jurisprudence of the mother country, the constructions given to those principles by the English Courts is cogent evidence of which they were designed to secure and of the limitations that should be put upon them. This is but another application of the familiar rule that where one State adopts the laws of another, it is also presumed to adopt the known and settled construction of those laws by the Courts of the State from which they are taken."

In England it is well settled that in such a case as this the bankrupt cannot impede the administration of his estate by withholding papers or information upon the plea of privilege.

In the Matter of John Heath, Court of Review in Bankruptcy, 1833, 2 Deac. & Chitty, 214. This was a motion for the commitment of a bankrupt for failure to answer questions.

ERSKINE, C. J., at p. 222, said :

" There can be no doubt in the principle that a man shall not be bound to convict himself, being a general well-established rule, and all the cases cited go that length. But to every rule there may be some exceptions, and I think the present clearly comes within what Lord ELDEN says in *ex parte Cossens* and which is recognized by Lord LYNTHURST in *ex parte KIRBY*, viz., 'I conceive that there is no doubt that it is one of the most sacred principles of the law of this country, that no man can be called on to incriminate himself if he choose to object to it; but I have always understood that proposition to admit of a qualification, with respect to the jurisdiction in bankruptcy; because a bankrupt cannot refuse to discover his estate and

effects and the particulars relating to them, though in the course of giving information to his creditors or assignees of what his property consists, that information may tend to show that he has property which he got, not according to law—as in the case of smuggling, and the case of a clergyman carrying on a farm, which he could not do according to an act of parliament, except under the limitations of the late act; and the case of persons having possession of gunpowder in unlicensed places, whereby they became liable to great penalties, whether the crown takes advantage of the forfeiture or not; in all these cases the parties are bound to tell their assignees, by the examination of the commissioners, what their property is, and where it is, in order that it may be laid hold of for the purposes of the creditors.'

'Now, with respect to the proposition of Mr. Montagu, I agree with him that you could not ask a man whether he had not robbed another man of a sum of money; because if he had so robbed, the money would not be the property of the assignees, but of the party robbed; it would be, in fact, no discovery of the estate of the bankrupt. But I can see no objection to this question (unless it might be regarded as a chain in evidence to convict the party of a robbery), viz.: 'Had you not on such a day and at such a place, £100?' And according to the answer you might then interrogate what he had done with it. In the present case the question is, 'What have you done with this property?' not 'How did you obtain it?' And I think all the cases have been decided in that way of looking at the question.

"In *ex parte Joves, Buck*, 337, the Vice-Chancellor refused the application on the ground that the use to be made of the papers was foreign to the purpose of due administration of the estate, observing that 'if the papers were necessary for that purpose, and it should appear to be the intention of the

assignees to make a further use of them in prosecuting criminal proceedings, the Court would not order the production without at the same time restraining the assignees from using them for any purpose foreign to the due administration of the estate.' That case is not even incidentally applicable to the present."

In the same case, *page 224*, Sir G. ROSE says :

"As to the obligation of the bankrupt to answer this question, I, for one, have not a moment's doubt. The expressions used throughout the cases in the books clearly establish, that in a case like the present, the bankrupt must answer. There can be no doubt but that this is a lawful question for the commissioners to put, it being *concerning his estate*, according to the words of the Act, that is to say, he must either answer or be committed for not answering according to the Act. *Ex parte Burlton (1 G. & J., 32)* was a question of the right of a *witness* to object; for I well remember in that case (in which I was engaged as counsel) examining the bankrupt myself, without any difficulty, although the objection was raised. It is true, there are no reported cases expressly deciding the present question; but it is to be observed that all such questions have probably arisen before the commissioners, and therefore would not be reported."

There was a question as to whether the Court had authority to commit on an examination which had been adjourned from the commissioner to the Court. A note at the end of the case recites :

"This case was alternately referred back to Mr. Commissioner Fontblanque and was by him referred to the Subdivision Court, composed of Mr. Commissioner Merivale, Mr. Commissioner Fontblanque and Mr. Commissioner Holroyd. The same line of

arguments was there urged pro and con, and the bankrupt still refusing to answer the question, he was, on the 20th of February, committed to Newgate; but he subsequently submitted to answer the question and was discharged."

Under the English rule, particularly as laid down in *ex parte Joves, Buck, 337*, quoted *supra* by ERSKINE, C. J., the precise method here adopted by the District Court of permitting the use of the books in administration of the estate and at the same time by the order saving for the bankrupt the right to assert his privilege if the occasion should thereafter arise is approved.

The English rule and the order of the District Court in this case meet the requirements of such a situation. They permit the administration of a bankrupt estate to go forward and save to the bankrupt the right to exercise his privilege when necessary. While the English rule is not binding upon this Court it is cogent evidence of the construction and limitation which should be put upon the principal which the constitutional amendment has transported from the English law.

The English rule has been applied in various courts of the United States.

Under the Act of 1867 by the U. S. Supreme Court, Territory of Utah, in *in re J. E. Bromley & Co.*, 3 *Nat. Bankruptcy Register Reports*, 686.

U. S. District Court, Eastern District of Wisconsin in *re Sapiro*, 92 *Fed. Rep.*, 340. This was a case of voluntary bankruptcy and the petition is referred to as a waiver.

U. S. District Court, Eastern District of Pennsylvania, in the *Matter of Hart Bros.*, 136 *Fed. Rep.*, 986; in *re Hess*, 136 *Fed. Rep.*, 988.

The result reached in these cases is that the books must be produced and if the plea of privilege

appears to be well founded in fact the Court will enable the receiver to obtain the necessary information from the books and at the same time make an order for the protection of the bankrupt from the discovery of incriminating evidence.

A trustee of a bankrupt estate under § 70 of the Bankrupt Act is vested by operation of law as of the date of the adjudication with the title of the bankrupt to all documents relating to his property.

Babbitt vs. Dutcher, 216 U. S., 102.

In a case where a trustee has been elected and title to the books has passed, it can hardly be said that by turning over the books to which he has no title to the trustee the bankrupt is becoming a witness against himself in a criminal case.

Title does not vest in a receiver in bankruptcy but a receiver has a right to possession, the property being within the control of the Court.

Remington on Bankruptcy, § 1121,
Vol. I, p. 640 ; § 1128, Vol. I, p.
643.

The Bankruptcy Act, § 2, provides,

“ Courts of bankruptcy * * * are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law or in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings in vacation in chambers and during their respective terms, as they are now or may be hereafter held to.”

Subdivision 3—

“ Appoint receivers or marshals upon the application of parties in interest in case the court shall find it absolutely necessary for the preservation of estates to take charge of the

property of bankrupts after the filing of the petition and until it is dismissed or the trustee has qualified."

The bankrupt's contention that the Court cannot take his books because they contain incriminating entries is a direct attack upon the jurisdiction of the Court. It impairs that jurisdiction and leaves the Court without power through its receiver to take possession of the complete property of his estate.

It is as if in an equity proceeding, to foreclose a mortgage for instance, a railroad company should refuse to turn over its books to its receiver on the ground that they would tend to show that it had committed a crime under the interstate commerce law, or a corporation or individual whose property had been placed in the hands of a receiver by a court of equity should refuse to turn over books or other records to its or his receiver on the ground that they might show an infringement of the Sherman Act.

That we have been able to find no case in which this contention has been seriously asserted as impairing a Court's jurisdiction to take property into its hands shows that the taking possession of property through a receiver has never been regarded as making a party defendant a witness against himself in a criminal case within the meaning of the constitutional amendment.

The fact that the Courts have unanimously been conceded to be entitled to take possession of all property and books through receivers in civil cases, emphasizes the correctness of the view that the constitutional privilege then becomes a matter for subsequent consideration when a proper case arises and a matter in which the Court will at the right time protect a party entitled to protection.

The Court's power to make an order of a purely possessory character in favor of its receiver for purposes of civil administration cannot be questioned without introducing a new and novel extension of the constitutional privilege and such an extension would involve a serious inroad upon the jurisdiction and effectiveness of the Courts whether in equity or bankruptcy.

To recapitulate, the order in question is purely possessory in character; it permits the use of the books only for the purpose of civil administration; it contains an express provision for the protection of the bankrupt if an attempt is made to secure the books for any other purpose; a denial of the Court's power to make it is a denial of the Court's jurisdiction over the estate—a proposition for which there is no authority in our law; the question raised by the bankrupt is premature and academic rather than practical and relates to future possibilities rather than present conditions, and so is within an exception to the application of the rule of privilege; the use of the books in civil administration of a bankrupt estate is a well-defined exception to the application of the rule of privilege in the jurisdiction from which the rule descended to us, and that neither the words of the amendment nor any construction which has ever been given it extends the privilege to prevent possession being taken of books by the Court through receivers in a civil action and for administration purposes.

It follows that the United States District Court had jurisdiction over the bankrupt and his books and properly exercised its power in making the order in question and such is a purely possessory order for purposes of civil administration only, is not an infringement of the bankrupt's constitutional privilege.

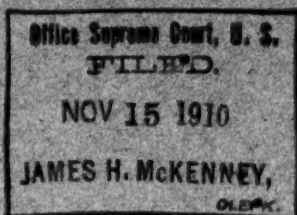
III.

*The question certified should be answered in the affirmative
and the case remanded with appropriate instructions.*

Respectfully submitted,

ABRAM I. ELKUS,
CARLISLE J. GLEASON,
Of Counsel.





Supreme Court of the United States

OCTOBER TERM, 1910.

NO. 165.

In the Matter

of

GEORGE HARRIS,

Bankrupt.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief on Behalf of Bankrupt.

MOSES H. GROSSMAN,
Of Counsel for Bankrupt.

Supreme Court of the United States

In the Matter
of
GEORGE HARRIS,
Bankrupt.

Brief on Behalf of Bankrupt.

This cause comes here on a certificate from the United States Circuit Court of Appeals for the Second Circuit, to which the matter was brought upon a petition by the bankrupt to revise an order of the District Court, Southern District of New York, sitting in bankruptcy. The order directed the bankrupt to deposit his books of account in the office of the Receiver of Bankruptcy, where the same should remain in the custody and possession of the bankrupt until the further order of the Court. It contains also the following provisions:

"That the said bankrupt shall afford the said Receiver, and his duly authorized representatives, full and free opportunity at his said office to inspect the said books and make extracts therefrom; that the said Receiver shall use the same, or permit their use by any other person, only and solely for the purpose of civil administration of the estate in bankruptcy, and that the same shall not be used in or for the purpose of any crim-

inal action, proceeding or prosecution against the said alleged bankrupt, in or before any Tribunal Court or Judge of any State or of the United States; it is further

"ORDERED, that in case any subpoena or other process is issued to the said Receiver for the purpose of obtaining the possession or production of any of said books, the said Receiver shall forthwith notify the said bankrupt, to the end that said bankrupt may have an opportunity to raise the question of his constitutional privilege." (Record, p. 1, fols. 1-2.)

Statement of Facts.

In February, 1908, the bankrupt made a statement as of January, 1908, to a commercial agency. Shortly after the filing of the involuntary petition herein, several creditors of the bankrupt threatened him with criminal prosecution for having obtained merchandise from them on credit by virtue of a false written statement as to his financial standing and responsibility, claimed to have been made by him to Bradstreet's Agency. Upon an examination had under the provisions of Section 21 A of the Bankrupt Act, two papers purporting to be a statement made by the bankrupt to Bradstreet's Agency showing his assets and liabilities as of January 4, 1908, and a letter enclosing the same, were exhibited to the bankrupt, but he declined to testify concerning them, on the ground that they might tend to incriminate him (Record, p. 1, fol. 2). The petitioner made oath that his books of account contain evidence which may tend to incriminate him, and filed an affidavit sworn to by one of his attorneys, to the effect that said books will show that the statement purporting to have been made by the bankrupt to the agency is in some

material particulars incorrect (Record, pp. 1-2, fol. 2).

The Receiver stated that the particular purpose for which he desired the books was to ascertain what disposition was made of the assets claimed by the bankrupt in his statement to the agency. The bankrupt expressed a willingness to permit an inspection of his books provided that could be done under some arrangement whereby he would not waive his right that the books should not be used against him in any criminal case (Record, p. 2, fol. 3).

The petitioner duly objected and excepted to the entry of the order now under review (Record, p. 2, fol. 3); and contended and here contends that this order violates the bankrupt's constitutional privilege under the Fifth Amendment to the Constitution of the United States (Record, p. 1, fol. 2); and that no statutory provision, either in the Bankrupt Act or elsewhere, protects him against the use of such information as may be found in his books to locate and obtain witnesses and evidence which may be produced against him on a criminal prosecution (Record, p. 2, fol. 3).

In accordance with the provisions of Section 6 of the Act of March 31, 1891, the Circuit Court of Appeals has certified this question, upon which it desires the instruction of this Court for its proper decision:

"Upon this state of facts is the order of the Bankruptcy Court a proper exercise of its authority?"

POINTS.

I.

Inasmuch as the books of account contain evidence which would incriminate the bankrupt, their delivery cannot be compelled, for to require such delivery would violate the bankrupt's constitutional privilege against incriminating himself.

The Fifth Amendment to the Constitution provides that

“No person * * * shall be compelled in any criminal case to be a witness against himself.”

1. The compulsory production of a man's private books and papers to be used in evidence against him, is compelling him to be a witness against himself, within the meaning of this amendment.

Boyd v. U. S., 116 U. S., 616.

Matter of Kanter & Cohen, 9 Am. B. R., 104.

In re Hess, 14 id., 559.

Wigmore on Evidence, Section 2264.

2. The bankrupt had been threatened with criminal prosecution for having obtained merchandise on credit by means of a false written statement (fol. 2), and it appears that the falsity of the statement referred to would be established by entries

in his books of account (fol. 2). True, no criminal prosecution is pending against him, but that fact is no answer to his right to claim this constitutional privilege.

"It is impossible that the meaning of the constitutional privilege can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would, doubtless, cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime."

Counselman v. Hitchcock, 142 U. S., 547.

"The fact that no prosecution is now pending against the bankrupt is no answer to his right to claim this constitutional privilege. The meaning of the constitutional provision is not simply that he shall not be compelled to produce books and papers which may contain evidence tending to incriminate him in a pending prosecution for a criminal offence against him, but its object is to insure him against such compulsory production of his books and papers containing incriminating evidence in any proceeding or investigation, whether such compulsory disclosure is sought directly to establish his guilt, or indirectly, and incidentally for the purpose of proving facts involved in an issue between other parties. If the disclosure thus made would be capable of being used against him as a confession of crime, or an admission of facts tending to prove the commission of an offence by himself, in any prosecution then pending, or that might be or brought against him thereafter, such disclosure would be

an accusation of himself, within the meaning of the constitutional provision."

In re Hess, 14 Am. B. R., 559.

3. The Bankruptcy Law (Act of July 1, 1898) does not supplant the constitutional privilege.

There is no provision in the Act giving the bankrupt immunity from the use of his books of account against him in case he delivers them to his Receiver or Trustee. The only provision for immunity to the bankrupt appears to be that contained in Section 7-a, subdivision 9, which provides:

"But no testimony given by him shall be offered in evidence against him in any criminal proceeding."

That provision does not meet this situation. But assuming that it does, it is inadequate, and cannot have the effect of supplanting the privilege, since it does not prevent the use of his testimony to search out other witnesses and other evidence upon which he might be convicted, and does not extend absolute immunity from future prosecution for any offence which such testimony might disclose.

"In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates."

Counselman v. Hitchcock, *supra*.

Re Feldstein, 4 Am. B. R., 321.

Matter of Kanter & Cohen, 9 Am. B. R., 104, and cases there cited.

In re Hess, *supra*.

People ex rel. Taylor v. Forbes, 143 N. Y., 219.

4. That the books of account contain entries which would tend to incriminate the bankrupt sufficiently, appears from the explicit averment that there are entries therein which will show that the statement in question is, in material particulars, incorrect (fol. 2). It thus clearly appears that the bankrupt's claim of privilege is well founded and is made in good faith. As, certainly, the case is not such that the Court can say that it is perfectly clear that he is mistaken and that the delivery of the books cannot possibly injure him, the privilege of the bankrupt must be recognized.

* "If the question be of such a description that an answer to it may or may not incriminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would incriminate himself, the Court can demand no other testimony of the fact."

1 *Burr's Trial*, 244, cited in *Counselman v. Hitchcock*, *supra*.

"Where it is not so perfectly evident and manifest that the answer called for cannot incriminate, as to preclude all reasonable doubt or fair argument, the privilege must be recognized and protected."

People ex rel. Taylor v. Forbes, 143 N. Y., at page 231.

"Generally the party best knows what he can furnish without accusing himself, and where it is not perfectly evident and manifest that the evidence called for will not be incriminating, the privilege must be allowed.

"Here the inculpatd parties explicitly depose that the books, etc., sought to be obtained would furnish evidence against them, and so far from being able to say that it clearly appears such would not be the case, I should be inclined to believe that it would, from the very nature of the evidence which the books, etc., would, in all probability, furnish."

Matter of Kanter & Cohen, 9 Am. B. R.,
104.

II.

The order herein compels the bankrupt to incriminate himself, in violation of his constitutional privilege.

This order provides that the bankrupt retain the possession and custody of his books of account, but that he deposit the same in the office of the Receiver and "afford the said Receiver and his duly authorized representatives full and free opportunity * * * to inspect the said books and make extracts therefrom." It further provides "that the receiver shall use the same or permit their use by any other person only and solely for the purpose of civil administration of the estate in bankruptcy, and that the same shall not be used in or for the purpose of any criminal action, proceeding or prosecution against the said alleged bankrupt in or before any Tribunal, Court or Judge of any State or of the United States" (fols. 1, 2).

We contend that this order deprives the bankrupt of the protection of his constitutional privilege, for the following reasons:

1. Although by the terms of the order the books

of account themselves cannot be used against the bankrupt in any criminal case, nevertheless the inspection of the books of account which the order authorizes, may indicate and point out witnesses and other evidence, apart from the books themselves, by means of which a criminal charge against the bankrupt may be established, and the bankrupt would thus be compelled to incriminate himself.

“It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.

“It afford no protection against the use of compelled testimony, which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party.”

Counselman v. Hitchcock, 142 U. S., 547.

2. Although the order prohibits the use of the books themselves in any criminal case against the bankrupt, it permits the Receiver to inspect them and take extracts therefrom (fol. 1). Suppose, then, the bankrupt should be indicted for a criminal offense, which could be established by means of entries in his books of account, and that upon the trial of such indictment he should be required, by subpoena or notice, to produce his books. Upon his failure to do so, would not the testimony of one who had examined the books, or the extracts made by the Receiver, be admissible as secondary evi-

dence of their contents? And could not the production of such secondary evidence be compelled by subpoena? Would not such evidence, in whatever manner obtained, be competent and admissible as against the bankrupt?

Adams v. New York, 192 U. S., 585.

Kerch v. U. S., 171 Fed. Rep., 366.

People ex rel. Zotti v. Flynn, 135 App. Div. (N. Y.), 276, 284.

And if these consequences may follow as a result of this order, requiring the bankrupt to furnish such incriminating evidence, is not the bankrupt thereby deprived of his constitutional privilege?

3. The provision of the order forbidding the use of the books in any criminal proceeding against the bankrupt, does not "afford him absolute immunity against future prosecution for any offense" to which said books relate.

Counselman v. Hitchcock, *supra*.

Furthermore, such a provision cannot take the place of his constitutional privilege. It may be competent for the Legislature to satisfy the constitutional requirement by according to a person absolute immunity from criminal prosecution upon any of the matters which he may be compelled to divulge.

But the Courts have no such power. In the absence of such legislation, the Courts must recognize and protect the privilege. The granting of immunity, such as here attempted, is extra-judicial. It is a function to be exercised by the Legislature, and not the Courts.

The endeavor to aid the Receiver in the administration of the bankrupt's estate furnishes no justification for the slightest encroachment upon the bankrupt's privilege. Of this order it may be said:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

Boyd v. U. S., 116 U. S., 616.

III.

The question certified should be answered in the negative, and the cause remanded, with instructions accordingly.

Respectfully submitted,

MOSES H. GROSSMAN,
Of Counsel for Bankrupt.

MATTER OF HARRIS, BANKRUPT.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 165. Argued April 28, 1911.—Decided May 15, 1911.

The right under the Fifth Amendment not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story.

A bankrupt is not deprived of his constitutional right not to testify against himself by an order requiring him to surrender his books to the duly authorized receiver. *Counselman v. Hitchcock*, 142 U. S. 547, distinguished.

Under § 2 of the act of 1898, where the bankruptcy court can enforce title against the bankrupt in favor of the trustee, it can enforce possession *ad interim* in favor of the receiver; and so held as to books of the bankrupt.

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Argument for the Bankrupt.

THE facts are stated in the opinion.

Mr. Louis J. Vorhaus, with whom *Mr. Moses H. Grossman* was on the brief, for the bankrupt:

Inasmuch as the books of account contain evidence which would incriminate the bankrupt, their delivery cannot be compelled, for to require such delivery would violate the bankrupt's constitutional privilege against incriminating himself. Fifth Amendment to the Constitution.

The compulsory production of a man's private books and papers to be used in evidence against him is compelling him to be a witness against himself within the meaning of that Amendment. *Boyd v. United States*, 116 U. S. 616; *Matter of Kanter*, 9 Am. Bank. Rep. 104; *Re Hess*, 14 Am. Bank. Rep. 559; Wigmore on Evidence, § 2264.

The bankrupt had been threatened with criminal prosecution for having obtained merchandise on credit by means of a false written statement, and it appears that the falsity of the statement referred to would be established by entries in his books of account. Even if no criminal prosecution is pending against him, that fact is no answer to his right to claim this constitutional privilege. *Counselman v. Hitchcock*, 142 U. S. 547; *Re Hess*, 14 Am. Bank. Rep. 559.

The Bankruptcy Act of July 1, 1898, does not supplant the constitutional privilege.

There is no provision in the act giving the bankrupt immunity from the use of his books of account against him in case he delivers them to his receiver or trustee. The only provision for immunity to the bankrupt is § 7a, subd. 9, which does not meet this situation. But even if it does, it is inadequate, and cannot supplant the privilege.

Under the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. *Counselman v. Hitchcock*, *supra*; *Re Feldstein*,

4 Am. Bank. Rep. 321; *Matter of Kanter*, 9 Am. Bank. Rep. 104, and cases cited; *In re Hess*, *supra*; *Taylor v. Forbes*, 143 N. Y. 219.

The books of account contain entries which tend to incriminate. It appears that the bankrupt's claim of privilege is well founded and is made in good faith. 1 Burr's Trial, 244, cited in *Counselman v. Hitchcock*, *supra*; *Taylor v. Forbes*, 143 N. Y. 231; *Matter of Kanter*, 9 Am. Bank. Rep. 104.

The order herein compels the bankrupt to incriminate himself, in violation of his constitutional privilege. *Counselman v. Hitchcock*, 142 U. S. 547.

Although the order prohibits the use of the books themselves in any criminal case against the bankrupt, it permits the receiver to inspect them and take extracts therefrom. The production of such secondary evidence ought to be compelled by subpœna. Such evidence, in whatever manner obtained, might be competent and admissible as against the bankrupt. *Adams v. New York*, 192 U. S. 585; *Kerrch v. United States*, 171 Fed. Rep. 366; *Zotti v. Flynn*, 135 App. Div. 276, 284.

If these consequences may follow as a result of this order, the bankrupt is thereby deprived of his constitutional privilege.

The provision of the order forbidding the use of the books in any criminal proceeding against the bankrupt does not afford him absolute immunity against future prosecution for any offense to which said books relate.

The endeavor to aid the receiver in the administration of the bankrupt's estate furnishes no justification for the slightest encroachment upon the bankrupt's privilege. *Boyd v. United States*, 116 U. S. 616.

Mr. Abram I. Elkus, with whom *Mr. Carlisle J. Gleason* was on the brief, for the receiver:

The bankrupt's contention involves an impairment

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both of efficiency in the administration of the Bankruptcy Act and of the court's power to take possession of the bankrupt estate. *In re Harris*, 164 Fed. Rep. 292, 293.

The more of fraud there has been on the part of the bankrupt the more strongly entrenched he will be against being obliged to turn over his books, and the more impossible will it become for the court to effect an equitable distribution of his assets among his creditors. If the court cannot take the property of the estate it is administering into its control it loses to that extent its jurisdiction and power over that estate.

The Fifth Amendment does not prevent a court from compelling a bankrupt to yield his books for purposes of civil administration of his estate. See *Brown v. Walker*, 161 U. S. 591, 596, as to exceptions of the application of the principle, viz.: Where the privilege is waived; where the accused person takes the stand in his own behalf; where the prosecution is barred by the statute of limitations; where the witness has been pardoned; where the answer of the witness will only tend to degrade or disgrace him; and where the danger is not real and appreciable but rather imaginary and unsubstantial. *Counselman v. Hitchcock*, 142 U. S. 547, is readily distinguishable by reason of the difference in the nature of the proceeding, and the different object sought thereby. The English law furnishes a limitation of the principle of the Amendment which is a potent consideration here. *Brown v. Walker*, *supra*, p. 600; and see *Matter of John Heath*, Court of Review, in Bankruptcy, 1833, 2 Deac. & Chitty, 214.

Under the English rule, particularly as laid down in *Ex parte Joves*, Buck, 337, the English rule has been applied in various courts of the United States. *Re Bromley*, 3 Nat. Bank. Reg. Rep. 686; *Re Sapiro*, 92 Fed. Rep. 340; *Re Hart Bros.*, 136 Fed. Rep., 986; *In re Hess*, 136 Fed. Rep. 988.

The result reached in these cases is that the books must

be produced and if the plea of privilege appears to be well founded in fact the court will enable the receiver to obtain the necessary information from the books and at the same time make an order for the protection of the bankrupt from the discovery of incriminating evidence.

A trustee of a bankrupt estate under § 70 of the Bankrupt Act is vested by operation of law as of the date of the adjudication with the title of the bankrupt to all documents relating to his property. *Babbitt v. Dutcher*, 216 U. S. 102.

Title does not vest in a receiver in bankruptcy but a receiver has a right to possession, the property being within the control of the court. *Remington on Bankruptcy*, §§ 1121, 1128.

The bankrupt's contention that the court cannot take his books because they contain incriminating entries is a direct attack upon the jurisdiction of the court. It impairs that jurisdiction and leaves the court without power through its receiver to take possession of the complete property of his estate.

MR. JUSTICE HOLMES delivered the opinion of the court.

In this case the District Court made an order that the bankrupt should deposit his books of account in the office of the receiver, there to remain in the custody of bankrupt; the latter to afford the receiver free opportunity to inspect the same, but the receiver to use and to permit them to be used only for the purpose of the civil administration of the estate and not for any criminal proceeding. It was ordered further that in case of subpoena or other process to the receiver for their production, he should notify the bankrupt, to the end that the bankrupt might have an opportunity to raise the question of his constitutional privilege. The bankrupt petitioned the Circuit Court of Appeals to revise the order. It appears that he made to a commer-

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cial agency a written statement of his assets and liabilities January 4, 1908, but he declined to testify concerning it, as it might tend to criminate him, several creditors having threatened him with prosecution for having obtained merchandise from them by that means. He also made oath that the books contained evidence that might tend to incriminate him; which was confirmed by an affidavit of his attorney. The receiver desired the books in order to ascertain what disposition was made of the assets alleged in the statement to the agency. On the other side the bankrupt was willing to allow an inspection if he could save his right that the books should not be used against him in a criminal trial; but he excepted to the order on the ground that no statute protected him from the knowledge gained from the books being used to find and get evidence that might be used against him in a criminal prosecution. He relied upon the Fifth Amendment and *Counselman v. Hitchcock*, 142 U. S. 547. The Circuit Court of Appeals certifies the question whether the order was a proper exercise of the authority of the Bankruptcy Court.

If the order to the bankrupt, standing alone, infringed his constitutional rights, it might be true that the provisions intended to save them would be inadequate and that nothing short of statutory immunity would suffice. But no constitutional rights are touched. The question is not of testimony but of surrender—not of compelling the bankrupt to be a witness against himself in a criminal case, present or future, but of compelling him to yield possession of property that he no longer is entitled to keep. If a trustee had been appointed, the title to the books would have vested in him by the express terms of § 70, and the bankrupt could not have withheld possession of what he no longer owned, on the ground that otherwise he might be punished. That is one of the misfortunes of bankruptcy if it follows crime. The right not to be compelled to be a witness against oneself is not a right to appropriate prop-

erty that may tell one's story. As the bankruptcy court could have enforced title in favor of the trustee, it could enforce possession *ad interim* in favor of the receiver.

§ 2. In the properly careful provision to protect him from use of the books in aid of prosecution the bankrupt got all that he could ask. The question certified is answered

Yes.
